SUPREME COURT OF THE UNITED STATES

October Term, 1952.

No. 193.

FORD MOTOR COMPANY, - - - - - - Petitioner,

versus

GEORGE HUFFMAN, Individually, and on Behalf of a Class, Etc., Et Al., - - - - - Respondent.

No. 194

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, Etc., - - - Petitioner,

versus

GEORGE HUFFMAN, Individually, and on Behalf of a Class, Etc., Et Al., - - - - - - Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT, GEORGE HUFFMAN.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENT, GEORGE HUFFMAN.

OPINIONS BELOW.

The majority opinion of the Court of Appeals (R. 30-38) written by Circuit Judge Allen and concurred in by Chief Judge Hicks is reported in 195 F. 2d 170, as is a brief dissent by Circuit Judge McAllister. The District Court rendered no opinion.

JURISDICTION.

Petitioners in their respective briefs have correctly stated the basis upon which the jurisdiction of this Court was invoked.

QUESTIONS PRESENTED.

The petitioner, Ford, raises one question:

Is the provision contained in collective bargaining agreements entered into by Ford as employer and UAW as statutory collective bargaining representative which gives to represented employees first hired by Ford following discharge from military service in World War II an artificial hiring-in date by adding credit for the period of such military service to compute their seniority status invalid?

The Court of Appeals held the provision invalid. Ford seeks a reversal of this holding.

The petitioner, UAW, raises the same question as Ford, and also a second question:

Do the Federal Courts have jurisdiction where a statutory bargaining representative breaches its duty or exceeds its powers as representative where there has

been no prior resort to administrative procedures of the National Labor Relations Board?

This question was not urged below, and is not adverted to in the opinion of the Court of Appeals.

STATUTES INVOLVED.

Both petitioners cite at some length sections they deem applicable from the National Labor Relations Act, as amended; from the Selective Training and Service Act, as amended, and from the Veterans' Preference Act of 1944. In addition UAW cites the Railway Labor Act. It would appear to be of no value and needlessly repetitious to set out the same again.

It would appear highly useful to add one small quotation to the "Statutes Involved" listed by petitioners. This addition is from Section 2 of the National Labor Relations Act, as amended, which section contains definitions of various terms used in the Act. Subsection (4) thereof defines "representatives" simply as including

> ". . . any individual or labor organization."

STATEMENT.

The Court of Appeals held that the contractual provision giving an artificial seniority credit to World War II veterans who were first hired by Ford *after* their discharge from military service was invalid. The judgment (R. 30-38 at page 38) states:

directly to the heart of this case in an admirably concise and clear-cut manner. It recognizes the all-important issue in the case (at page 3 of the brief) as being:

> ". . . what is a legitimate interest of the bargainers in a collective bargaining relationship, and what, on the other hand, is forbidden territory . . ."

However, the CIO then urges the validity of the challenged clause upon the basis that it is socially desirable. Disregard whether the particular contract provision under examination is socially desirable or undesirable—and there is a good argument either way—and the question is automatically raised: Is the power of a statutory collective bargaining representative dependent upon or related to the social desirability of its goals?

"A good union," says CIO, "conscious of the needs of society and its responsibility to the community, will attempt . . ." to bargain for socially desirable aims. No reference is made to the source of the authority for a statutory collective bargaining agent so to do. Nor is any attempt made to define by what standards it is to be determined what is socially desirable and what is socially undesirable.

In total effect this line of argument is one that would treat the mandate of Congress as embodied in the National Labor Relations Act, as amended, as one authorizing labor unions and the so-called labor movement to use the statutory bargaining authority which

vests in them by their becoming designated as bargaining representative pursuant to the processes under the Act to advance the particular union's social political and economic theories and philosophy. This is, of course, with the proviso that the particular theory or philosophy advanced thereby is "socially desirable" by undefined and decidedly nebulous standards.

This is a complete misconception of the role of the union functioning as a statutory collective bargaining agent. So to hold amounts to according to the statutory representative a role of overlordship over those whom it represents, and to permit it to hand down ukases and decrees as between those whom it represents upon considerations which are outside the scope of the representative's competence.

The union functioning as collective bargaining representative pursuant to Section 9 (a) of the Act is a representative. That is the word used in the Act, and the practices and procedures that have been sanctioned by the Labor Board, by the Courts, and by custom leave no room for doubt that the role of the Union so functioning is *representative.*

Attempts at precise definition are always difficult and in such a dynamic area as labor-management relations it has not been possible to pin down, with exactness, what the role of the statutory representative for the purposes of collective bargaining may be. Attempts to treat of collective bargaining and of the parties thereto and their respective and reciprocal rights and duties, powers and liabilities, privileges and immunities have sought for clarity by way of analogy among more

settled legal precepts. Much underbrush has been cleared away, but no complete answer has been produced which spells out in unequivocal language just exactly what the limitations of collective bargaining are, nor who has what right to do what, to or for whom, for what purposes.

It is not proposed here to don any mantle of omniscience and produce the word which will put a final period to the many doubts, uncertainties and equivocations necessarily inherent in the complexities of collective bargaining in its present state of development in our law. However, in the matter under consideration on this appeal there are a few things which are sufficiently fixed by law, by Labor Board interpretation and application, by Court decision and by custom and practice to provide a framework for reference which is stable.

ITEM ONE. "Representative" is the word used in the Act when referring to the exercise of the collective bargaining function. It is obviously a deliberate choice and intended to mean something other than "Agent."

The fourth (4th) literary paragraph of the Act, Section 1 of Title I, declares it to be the policy of the United States to encourage collective bargaining and to protect workers in the

> ". . . designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Subsection (4) of Section 2 of Title I of the Act defines "representatives" simply as including

". . . . any individual or labor organization."

While it may be difficult to define fully what is meant by using the term "representative," it is sufficient for the purpose of this discussion to state certain minimum restrictions which are inherent in the term. For one, a representative functioning as such—whether an individual or an organizational apparatus—is an artificial entity (if that), and has no separate identity from the person or persons being represented. The representative exists as such only because there is something to be represented, and it exists to act for, to serve in the name, place and stead of, to wear the shoes of the represented.

It would seem fair to say that a representative *as a representative* exists to serve the represented. It is always the servant, never the master. It can have no differing or adverse interests as representative from those represented, else it ceases to be a "representative" and assume a separate identity.

ITEM TWO. The collective bargaining representative represents a "class." Section 9 (a) of Title I of the Act reads:

> "Represetatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or the other conditions of employment . . ."

In Steele v. L. & N., Mr. Chief Justice Stone wrote:

> ". . . the bargaining representative, when chosen . . . represents . . . the class, and not the majority."

In the case of Wilson & Co., Inc. v. N. L. R. B. (C. A. 8th), 115 F. 2d 759, 765, the Court sums up the collective bargaining obligation in admirable language, in part saying:

> "It obligates the employer to bargain in good faith both collectively and exclusively with the chosen representative of a majority of his employees with respect to all matters which affect his employees as a class, including wages, hours of employment and working conditions." (Citing cases.)

It is in this indisputably correct concept of the labor organization functioning as a statutory collective bargaining representative being *representative of a class* that the answer to the problem raised would appear to lie.

Both the Wagner Act and its present amended form provided for a group of persons in an "appropriate unit" to be represented by a collective bargaining representative or agent. The representative may be —and usually is—a labor organization. The labor organization usually is a voluntary unincorporated association.

The group of persons who may constitute an "appropriate unit" has been a much litigated matter.

However, the general criteria followed by the Labor Board is uncomplicated.

> "The act imposes upon the Board the duty to determine, whenever the question arises, whether a proposed or existing bargaining unit is 'appropriate' in the sense that it will 'assure to employees the fullest freedom in exercising the rights guaranteed by the Act.' (*Cf.* Sec. 9 (b)) . . .
>
> "In resolving unit issues, the Board's primary concern is to group together only employees who have substantial mutual interest in wages, hours, and other conditions of employment . . ."
>
> Fifteenth Annual Report of the National Labor Relations Board, pages 38-39.

It would seem clear that the statutory representative is representative for the group or unit in those matters in which they have a community of interest; that is, the agent represents the group or unit in its group interest—the "substantial mutual interest in wages, hours, and other conditions of employment" which is the *raison d'etre* for the group being treated as a unit.

ITEM THREE. In the representation of a class the representative has the duty to represent fairly all those for whom it acts, and cannot bargain for the class upon the basis of considerations which are not related to the class as a class.

Fortunately for the sanity of lawyers and judges the usual situations in which the authority and duties of a class representative are involved are much simpler than those arising out of the collective bargaining complex. A glimpse at an analogous situation promises some degree of illumination.

"Under the uncontradicted facts the seniority system as to Huffman and those similarly situated is discriminatory. Plainly a contract which, in case of layoff, prefers men without experience over men with experience, no other facts appearing and no other valid reasons for preference existing, is discriminatory. When an employee who entered the Ford plant in 1945 is retained in layoffs over Huffman, who entered in 1943, Huffman is discriminated against."

These are the *uncontradicted* facts. It is with these operative facts that petitioners must deal. Extended discussion of probabilities and possibilities and advisabilities can not be permitted to obscure these uncontradicted facts, because the decision turns on them.

Clarification.

Before proceeding with any discussion of the arguments advanced by the petitioners, it would appear desirable to attempt to clarify the contract provision struck down by the Court of Appeals. A reading of the arguments contained in petitioners' briefs could convey an erroneous (and obviously not so intended) impression that the contested clause gave preferential seniority treatment *only* to those young veterans who had not worked anywhere else, but who—such is the inference—went from school to the armed services and on discharge to Ford. *This is incorrect.*

That is what is said in Section 13 of the July 30, 1946, contract between Ford and UAW (R. 3, para. 4, subsection "(c)"), but the very next subsection "(d)"

spells out that regardless of the foregoing clause, *all veterans* then in the employ of Ford should receive such credit. Identical provisions appear in the next (August 21, 1947) collective agreement between Ford and UAW (R. 17-18). The third (September 28, 1949) agreement froze and preserved such preferential seniority credits (R. 21, Sec. 12(c)) but dropped the clause out as to any future hire-ins.

It appears clear that the clause was not limited to aiding the extremely youthful, or those without previous employment records, but even gave preferential seniority to those who had a job they could reclaim with another employer by virtue of the re-employment provision of the Selective Training and Service Act, 54 Stat. 890, 5 U. S. C. 308. Also, the same preferential seniority credit applied to men who after discharge obtained employment elsewhere and subsequently were hired by Ford. Too, one who lost his re-employment rights under that statute by not reclaiming his job with Ford could later be hired in and accorded full seniority over one who had carefully preserved the right to be re-employed accorded him by the Congressional mandate.

Huffman's Class.

Also it appears desirable at this state to comment briefly upon the constituency of the class of which the respondent, Huffman, is a represetative. As has been pointed out by the adverse parties herein, the class for which Huffman brought his action included veteran and non-veteran alike. The decision of the Court of Ap-

peals upholding his claim uses language which indicates that court's belief that all members of the class are veterans. No point has been made of this on behalf of the respondent because it is apparent from the treatment accorded the item by the adversary parties that it is conceded that the benefits of the Sixth Circuit's decision do enure to all members of the class, whether veterans or not. The matter is referred to here only in the interests of clarity.

SUMMARY OF ARGUMENT.

I.

Although not urged below, nor adverted to in the judgment of the Court of Appeals, the petitioner union argues that the Federal Courts do not have primary jurisdiction to enforce the statutory obligation of the collective bargaining representative not to use its collective bargaining authority granted to it and being exercised pursuant to Section 7 of the National Relations Act, as amended, discriminatorily or unfairly.

The National Labor Relations Board has indicated express authority by the Act to prevent any and all violations of Section 7. The Board's authority (under Section 10 (a) of the Act) is to prevent the unfair labor practices set out in Section 8 of the Act. All the unfair practices listed in Section 8 may be violations of Section 7, but the converse is not true. All violations of Section 7 are not necessarily unfair labor practices.

The National Labor Relations Board has indicated that it may in a proper case revoke its certification of

a collective bargaining representative found guilty of using its bargaining authority in a discriminatory manner (R K O Radio Pictures, Inc., 61 N. L. R. B. 112). It has not ever done so, and its indication that it may, seems directed at something other than circumstances such as concern us here.

It is beyond the power of our imagination to conceive of the Labor Board denouncing the UAW's implementation of that International Union's public relations policy as an unfair labor practice within the meaning of Section 8 (b) (1) of the Act prohibiting the restraint or coercion of employees in the exercise of their rights under Section 7 of the Act to organize and bargain collectively.

Further, there does not appear to be any satisfactory remedy which the National Labor Relations Board could invoke. In the R K O case it is indicated that the Board in a proper case could and would revoke certification. Such an action would not remedy anything in the present case.

II.

The contractual provisions struck down by the Court of Appeals discriminated against men with more experience—a longer record of actually working on the job for Ford—and preferred over them, men of less experience. The basis of the discrimination has no relationship whatsoever to the employer-employee relationship. Factors of age, skill, experience, ability, productivity, merit and every other factor ordinarily considered relevant were dropped from consideration

entirely. The sole test was how much time was spent in military service from and after June 21, 1941. Variations are permissible, but they must be based on *relevant differences* (Steele v. L. & N. R. Co., 323 U. S. 192, 202, 203).

The (union) petitioner's argument that the seniority provisions in question were in the interest ". . . of the union as a whole . . . " because thereby was avoided a repetition of the bitter conflict between veteran and *organized labor* which took place after World War I betrays that the (union) petitioner used its bargaining authority *not* for the purposes intended by the National Labor Relations Act, but to implement and advance the public relations policies and the political, economic and social theories and philosophy of the International Union. The Act says "representatives" not *union*.

Designation of a statutory collective bargaining representative by and through Labor Board procedures under the National Labor Relations Act, as amended, is for the purpose of *representation* in collective bargaining. The representation is of a particular group of employees, and the bargaining authority is to be exercised for their benefit as employees of their particular employer. The welfare of organized labor generally cannot and does not take precedence over the duty—for all practical purposes, a fiduciary duty—to exercise the statutory bargaining authority in the interests of the members of the particular group to *represent* whom the authority has been reposed in the representative.

The analogy used by this Court in Steele v. L. & N. R. Co., 323 U. S. 192, 202 (*Cf.* J. I. Case v. N. L. R. B., 321 U. S. 332), likening a bargaining representative's role to that of a legislature is a useful one. However, the manner in which it has been seized upon by Ford and UAW as their complete justification for the seniority clause in question is, we are sure, a far cry from what this Court meant or intended. A bargaining representative performing its function does not by virtue of the legislative analogy become entitled to fill in the gaps left by Congress.

THE ARGUMENT.

I. The Federal Courts Have Primary Jurisdiction to Enforce the Statutory Obligation of the Collective Bargaining Representative Not to Use Its Collective Bargaining Authority Granted to It and Being Exercised Pursuant to Section 7 of the National Labor Relations Act, as Amended, in a Discriminatory or Unfair Manner.

Item V of UAW'S argument (pp. 47-51 of its brief) insists that respondent should have resorted to the administrative processes of the National Labor Relations Board before seeking judicial relief. It is argued that the effect of the language in the opinion of the Court of Appeals that the failure of the representative in collective bargaining to represent employees fairly and without discrimination violates Section 7 (of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. 141) is to find that

an unfair labor practice has been committed. Therefore—so the union argues—an unfair labor practice charge should have been filed against UAW, and not the suit in the district court.

Unfortunately for this argument a study of Section 8 of the Act which lists the specific charges of unfair labor practices that may be brought does not reveal any charge than can be brought in the circumstances under discussion. The petitioner appears to believe that a charge could have been brought under Section 8 (b) (1) spelling out that it is an unfair labor practice ". . . to restain or coerce (a) employees in the exercise of the rights guaranteed them by Section 7 . . ."

Section 7 is the basic declaration of employees' rights and provides that:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

The respondent's complaint is not that there has been any restraint or coercion by anyone to interfere with self-organization, nor to refuse or deny collective bargaining. To the contrary, the complaint is that the bargaining went too far and too far afield.

This part of UAW's argument has been answered for all practical purposes by the CIO in its brief already filed herein as Amicus Curiae, and in the belief

that the treatment accorded it there is completely adequate, the liberty is taken of quoting the same as follows:

> "The assumption that discrimination would violate Section 7 of the National Labor Relations Act, however, does not necessarily require the conclusion that the exclusive remedy for this violation lies with the National Labor Relations Board. While it is true, as stated by the UAW, that the Act, unlike the Railway Labor Act, does provide for administrative remedies for unfair labor practices, it is also true that the National Labor Relations Board is not expressly given authority to police violations of Section 7. Section 10 (a) of the Act empowers the Board to prevent the unfair labor practices listed in Section 8 of the Act. But it is not necessarily true that all violations of Section 7 also constitute unfair practices under Section 8.
>
> "The Board itself has never passed on the question of whether discriminatory action by a statutory collective bargaining representative outside of the legitimate scope of its bargaining territory would constitute an unfair labor practice. The Board thus far has determined only that, in the exercise of its powers under Section 9 to certify the collective bargaining representative, it will not regard itself as being precluded from taking appropriate remedial action such as redetermination of the bargaining unit or a revocation of the certification where it finds discrimination being practiced (RKO Radio Pictures, Inc., 61 N. L. R. B. 112).

> "The Board, in fact, has never used the power which it asserted in the RKO case and in similar cases insofar as we are aware. It certainly has not yet decided that it has the additional power to prevent discrimination by determining that such discrimination constitutes an unfair labor practice under the Section 8 (b) (1) declaration that it is an unfair labor practice for a union to 'restrain or coerce . . . . employees in the exercise of the rights guaranteed in Section 7.'"

Even were this a case in which the Labor Board could and did act, the action it indicated in RKO that it would take—decertification—is no remedy at all so far as the aggrieved individuals are concerned. Although the cases of Steele *v.* L. & N. R. Co., 323 U. S. 192, and Tunstall v. Brotherhood, 323 U. S. 210, arose under the Railway Labor Act, and the instant case arises under the National Labor Relations Act, as amended, there seems no doubt that discrimination between employees is a violation of the statutes under either statute. Further under neither statute is provision made for an administrative remedy, and, as pointed out above, the possible action of revoking certification in the instant case provides no relief at all to the aggrieved individuals. It would follow then that the Federal Courts do have primary jurisdiction in the instant case on exactly the same grounds that this Court decided the matter of jurisdiction in the Steele and Tunstall cases.

II. The Contractual Provision Giving an Artificial Seniority Credit for the Period of Their Military Service to World War II Veterans First Hired by Ford After Their Discharge From Military Service Was Properly Held To Be Invalid.

THE UNION'S ARGUMENTS.

The reasons—other than the jurisdictional question—urged by UAW to upset the decision of the Court of Appeals are divided by it into four heads. They are slightly curious in that they—while stated variously—are grounded upon two fundamental assumptions:

1. What was done was in the interests of organized labor and advanced the cause of the labor movement.
2. The union was only doing the same thing that Congress tried to do with Section 7 of the Selective Training and Service Act, excepting that the union did it better and more fully and thoroughly.

These are interesting assumptions. However, as justification for negotiating the provisions struck down by the Court of Appeals they appear to lack adequate sanction in either the applicable legislation or in any judicial construction to such effect.

Briefs have heretofore been filed here by both Ford and UAW. Likewise, the CIO as Amicus Curiae has filed a brief with the consent of all interested parties. The CIO brief is of particular interest because it goes

collectively as an entity in itself with rights superior to those whom it represents.

2. The Union bargaining collectively for an aggregation of workers represents them as a "class" and its authority extends to all matters which affect the employees as a class of employees of a particular employer.

3. The Union bargaining collectively for an aggregation of workers has the duty to represent fairly all those for whom it acts, and, bargaining for the "class," it cannot bargain upon the basis of considerations which are not related to the class as a class.

4. Relevancy to the collective interests of the class as employees of the particular employer is the test of whether variations in the terms of a contract based upon differences between employees is proper, and the fact that one group are unskilled laborers is relevant while the fact that one group has three or more children each and another group has none is not relevant.

5. Preference for veterans of military service is a legitimate concern of a Legislature representing the entire body politic, but not of a bargaining representative of a class whose only common characteristic is that they are all employed by a particular employer.

CONCLUSION.

Huffman and his class have been discriminated against. Ford and UAW chose to negotiate a contract which in case of layoff prefers men with less working experience over them, no other relevant facts appearing, and for no valid reason that had anything directly to do with the employer-employee relationship. That UAW was motivated to do this to advance the cause of organized labor does not absolve it of having breached its duty as statutory bargaining representative. The National Labor Relations Act, as amended, does not confer bargaining authority upon a representative to use to advance its theories of social desirability at the expense of the individuals being represented.

Further, since both appellees moved for summary judgment in the District Court and both admitted the material allegations of the petition, Ford's request for a trial on the issue of validity of the contract would appear contradictory, inconsistent and late.

WHEREFORE, it is prayed that the Court sustain the Court of Appeals.

Respectfully submitted,

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